TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

State Statutes

Other Authorities

POINTS RELIED ON

The Trial Court erred in declaring Ordinance 64923 invalid based on the failure of the Civil Service Commission to recommend it because the Commission does not have a mandatory right to recommend ordinances pertaining to the Firemen's Retirement System in that

(A) Ordinance 64923 does not concern a matter of "compensation" within the meaning of Article XVIII, §§ 4(a) and 7(b)(1) of the Charter of the City of St. Louis;

(B) no mandatory recommendation authority should be read into Section 4(b) of Article XVIII, §§4(b) and 7(b) of the Charter of the City of St. Louis;

(C) the decision of the Missouri Supreme Court in *Abernathy v. City of St. Louis*, 313 S.W.2d 717 (Mo. 1958), does not require that Ordinance 64923 be held invalid; and,

(D) equitable principles support reversal of the trial court's decision on the merits.

St. Louis, Mo., Charter, Art. XVIII, §§ 4(b), 7(b)(2)

Firemen's Retirement System of St. Louis v. City of St. Louis, 789 S.W.2d 484 (Mo. banc 1990)

ARGUMENT

The Trial Court erred in declaring Ordinance 64923 invalid based on the failure of the Civil Service Commission to recommend it because the Commission does not have a mandatory right to recommend ordinances pertaining to the Firemen's Retirement System in that (A) Ordinance 64923 does not concern a matter of "compensation" within the meaning of Article XVIII, §§ 4(a) and 7(b)(1) of the Charter of the City of St. Louis; (B) no mandatory recommendation authority should be read into Section 4(b) of Article XVIII, §§4(b) and 7(b) of the Charter of the City of St. Louis; (C) the decision of the Missouri Supreme Court in *Abernathy v. City of St. Louis*, 313 S.W.2d 717 (Mo. 1958), does not require that Ordinance 64923 be held invalid; and, (D) equitable principles support reversal of the trial court's decision on the merits.

A. Ordinance 64923 does not concern a matter of "compensation" within the meaning of Article XVIII, §§4(a) and 7(b)(1) of the Charter of the City of St. Louis.

Respondents urge this Court to uphold the decision of the trial court on a basis other than that set forth in the court's decision. Respondents argue Ordinance 64923 effects "compensation" within the meaning of Sections 4(a) and 7(b)(1) of Article XVIII of the Charter of the City of St. Louis, thus fitting this case neatly under the decision of

the Missouri Supreme Court in *Kirby v. Nolte*, 173 S.W.2d 391 (Mo. banc 1943). Respondents' argument should be rejected.

Respondents sidestep the principal flaw in their interpretation of Article XVIII of the Charter – it effectively removes Sections 3(r), 4(b), and 7(b)(2) from Article XVIII. If the term "compensation" encompasses retirement benefits, as respondents suppose, then there is no need for the separate sections on retirement. These sections must have some meaning separate from the provisions on compensation; they cannot be dismissed in the manner sought by respondents.

Respondents attempt to bolster their argument by characterizing Ordinance 64923 as legislation involving sick pay. Undisputedly Ordinance 64923 uses the term "sick pay" and the concept of sick pay. However, a review of the ordinance as a whole yields one conclusion: the ordinance enhances the retirement benefits of firefighters, not their sick leave benefits. The preamble to the ordinance states it is "[a]n ordinance pertaining to the firemen's retirement system." (Brief of Firemen's Retirement System of St. Louis, p. A1) Accrued Sick pay is merely the mechanism used to either enhance service for purposes of retirement or to increase a firefighter's DROP account. Notably, accrued sick leave has been a factor in the FRS for over ten years, without prior objection from the Commission. *See* L. 1989, S.B. No. 334, § 1.

Respondents' quote paragraph (2) of Section Two of the ordinance, which fixes a rate of accrual of sick leave. Respondents contend this paragraph shows Ordinance 64923 concerns sick leave, a matter of "compensation" under Sections 4(a) and 7(b)(1) of Article XVIII. Respondents misread the paragraph. As the City states in its brief, this

portion of the ordinance can be read, and in the view of the Firefighters must be read, as fixing the accrual rate of sick leave only for purposes of retirement benefits and not the accrual of sick leave for purposes of allowing active firefighters to have paid time off when sick. The correctness of this interpretation of this paragraph of the ordinance is shown by several facts. As noted, the ordinance as a whole concerns the Firemen's Retirement System of St. Louis ("FRS") and retirement, not sick leave. Paragraph (2) of Section Two of the ordinance refers to "members", a reference to "members" of the retirement system, not to employees of the City. *See* St. Louis, Mo., Rev. Code, §4.18.010(L). Finally, the accrual limitation is qualified by the following language, "which may be credited pursuant to the provisions of this section." This language specifically refers to crediting service or benefits under Section 4.18.386 of the City code, a provision in the chapter of the code regarding the FRS. The purpose of this language is not difficult to see: it serves to prevent future changes in sick leave accrual from undercutting the retirement enhancement of the Ordinance.[1]

B. No mandatory recommendation authority should be read into Section 4(b) of Article XVIII of the Charter of the City of St. Louis.

Examining the issue purely from the language of the Charter, the dispute of the parties boils down to two well-presented opposing views. The Firefighters and the FRS contend the use of the phrase "on recommendation of the civil service commission" in

[1] The reference to the Firefighters by respondents in footnote 1 on page 24 of their brief is incorrect. Respondents are referring to the brief of the FRS.

Section 4(a) regarding compensation and the absence of this phrase from Section 4(b) covering retirement systems is critical and dispositive here. The Firefighters and the FRS also view as significant the language in Sections 4(b) and 7(b)(2), "if and when permissible under the Constitution and the Laws of the State of Missouri." The Commission, on the other hand, relying on Section 7(b) and the civil service system as a whole, as set forth in Article XVIII, argues the mandatory recommendation authority of the Commission must be read into Section 4(b).

The issue before the Court is the validity of Ordinance 64923. The Commission does not enact ordinances. Regardless of the duty of the Commission to make recommendations, as set forth in Section 7(b), the Mayor and the Board of Aldermen of the City enact ordinances. Section 4 of Article XVIII addresses the power Mayor and the Aldermen and governs the enactment of ordinances in this situation. *See Kirby v. Nolte*, 173 S.W.2d 391, 392 (Mo. banc 1943) (holding that Section 4(a) limited the legislative power of the Mayor and Aldermen of the City with regard to a compensation plan by requiring the recommendation of the Commission). While the other provisions of Article XVIII, including Sections 3 and 7, may be considered, the greatest weight in interpreting the Charter must fall on Section 4. In this setting, the absence of the phrase "on recommendation of the civil service commission" in Section 4(b) after its use in Section 4(a) cannot be trivialized, and, in fact, must be considered critical. Otherwise, this distinction between Sections 4(a) and Section 4(b) must be effectively overlooked.

Further, in these circumstances, reference to other relevant circumstances is appropriate; the Firefighters discussed the circumstances they view as relevant in their

original brief. Respondents' strident opposition to several of these points mischaracterizes the arguments asserted.

Contrary to respondents' assertion, appellants' interpretation of Article XVIII of the Charter does no harm to the civil service system or the Commission's role in that system. As a cursory review of Article XVIII demonstrates, the Commission has a myriad of duties in the scheme of a comprehensive civil service system for City employees. Firefighters are civil service employees and subject to the civil service system. The FRS, however, established by state law, is not a part of the civil service system. Perhaps the most telling is the fact that for over 50 years the Commission has never before asserted this right to recommend ordinances regarding the FRS. During this lengthy period of time the civil service system and the FRS existed separately and the role of the Commission was not thereby diminished.

Respondents mischaracterize the Firefighters' discussion of the scheme of state law governing the FRS. Given the reference to state law in Sections 4(b) and 7(b)(2) of Article XVIII of the Charter, examination of state law is necessary. The Firefighters' do not dispute that the state law establishing the FRS is enabling legislation, not mandatory legislation. Nevertheless, the FRS is a unique creation under state law, separate from the retirement systems of the police and of the other City employees. Further, the system for amending the FRS is unique, requiring both state legislation and a local ordinance. Under the state law governing the FRS, the Commission has no role. Under the unique system of law governing the FRS there is no reason as a matter of reason or as a matter of policy, for the Commission to have a role.

Respondents argue the law is clear and if appellants don't like the asserted mandatory recommendation requirement they should have the law amended, not ignore it. (Respondents' brief, p. 34, 38) To the extent this old chestnut ever had any persuasiveness, it has long since been burned away. If the mandatory recommendation sought by the Commission is so obviously the law, then all the parties, including the Commission, have long ignored it.

C. The *Abernathy* decision does not require that Ordinance 64923 be held invalid.

Respondents argue *Abernathy* must be read to require the Commission's recommendation for any ordinance pertaining to the civil service system. Appellants do not accept that *Abernathy* must or should be read so broadly. Appellants submit that reading only that portion of the opinion which is necessary to the decision requires only applying Sections 4(a) and 7(b)(1) of Article XVIII to the dispute over overtime pay, not the extension sought by respondents. Moreover, because the FRS was established to be separate and independent from the City and its civil service system (and has remained so), *Abernathy* cannot be stretched to encompass ordinances pertaining to the FRS as easily as respondents contend.

D. Equitable principles support reversal of the trial court's decision on the merits.

Responding to issues raised in the brief of the FRS, respondents argue neither waiver nor laches were established before the trial court or are inapplicable to the Commission. Even though the remedy established by the trial court is not before this Court, equitable principles are relevant to the underlying merits of the trial court's decision, and these principles support appellants' position that the Commission has no mandatory right to recommend ordinances pertaining to the FRS.

Respondents argue the elements of waiver are not present and mere forbearance is insufficient to establish waiver. The Firefighters submit more than mere forbearance has occurred. The present situation is similar to the case of *Pasley v. Marshall*, 305 S.W.2d 879 (Mo. App. 1957). In *Pasley* the administrator of Mrs. Davis' estate filed a claim for commissions for her performance of the duties of guardian of her husband, Mr. Davis, for 28 years. Mrs. Davis had served as guardian of Mr. Davis and his estate for 28 years, until her death. During that period, she had filed 28 annual statements, never seeking any commission. In addition, she received from the estate a total of approximately $18,500 as maintenance. The court found more than "mere forbearance for a reasonable time to enforce an existing right," which would not support a finding of waiver; the court found the filing of 28 consecutive annual statements without asserting the right to a commission unreasonable. *Pasley*, 305 S.W.2d at 882.

For approximately 50 years the Commission has watched the creation and amendment of the FRS through numerous ordinances, taking no action to assert is

purported right to recommend each and every such ordinance, for whatever reason. The Commission, by inaction, even gave prior ordinances involving the use of sick leave for enhancing retirement benefits carte blanc. However, during that same time period, it recommended (and likely on occasion refused to recommend) ordinances relating to the wages of civil service employees and regarding the City's retirement system. During these five decades, all the parties concerned, including the firefighters who are and were members of the FRS, relied and acted in accordance with the numerous ordinances pertaining to the FRS. Regardless of any unproven reliance on an opinion letter of the City Counselor, these facts show more than mere forbearance, they demonstrate the Commission's clear intention not to be involved in ordinances pertaining to the FRS.

Moreover, regardless of the principle of waiver, the Commission's failure to act is relevant to the interpretation of the Charter provisions at issue. Respondents' attempts to distinguish the case of *Firemen's Retirement System of St. Louis v. City of St. Louis*, 789 S.W.2d 484 (Mo. banc 1990), fail to address the pertinent point of this case: the historical actions of the parties concerned are relevant interpreting the applicable law. The issue before the court in *Firemen's Retirement System* was whether the secretary of the FRS was a civil service employee under the civil service system of the City. In interpreting the pertinent provisions of the City code, the court noted that the City had not asserted any control over the secretary at issue since inception of the FRS. *Firemen's Retirement System,* 789 S.W.2d at 487. Just as that fact was relevant in *Firemen's Retirement System,* it is relevant here.

The Firefighters did not raise the argument of laches in this Court. Nevertheless, respondents' arguments warrant response in two respects. Respondents argue there was no undue delay and explain their purported reasons for not filing suit sooner. (Respondents' brief, p. 46-47) These reasons were not established by proof and are not in evidence. The undisputed facts show the Commission knew of the ordinance shortly after its introduction, and knew its written objections to the ordinance were being ignored by the Board of Aldermen. The Commission filed suit six months after Ordinance 64923 was enacted and thereafter failed to seek preliminary injunctive relief.

Further, respondents' argue no evidence of prejudice was presented. Respondents apparently do not believe that invalidating an ordinance, having 15 firefighters actually retire and take advantage of the benefit of the ordinance, having 132 firefighters eligible to retire under the ordinance, and having an unknown number of other firefighters who might become eligible to retire under the ordinance, constitutes no evidence of prejudice. The Firefighters fail to comprehend what constitutes prejudice if pulling the benefits of Ordinance 64923 out from under these firefighters does not constitute prejudice. Such prejudice constitutes just the kind of injustice and extraordinary circumstances which permits application of these equitable principles to an agency such as the Commission. *See City of Washington v. Warren County*, 899 S.W.2d 863, 867 (Mo. banc 1995) (estoppel may be applied against governmental entities in exceptional circumstances).

CONCLUSION

For the reasons stated in this brief and in the original brief of the Firefighters, the decision of the trial court should be reversed in its entirety and plaintiffs' complaint and the relief sought therein be denied in all respects.

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Certifications of compliance, virus-free diskette

The undersigned certifies, as required by Mo. Sup. Ct. Rules 84.06(c) and (g): the brief complies with Rule 55.03; the brief complies with the requirements in Rule 84.06(b), containing 2,942 words (determined using the word processing software's word count function); and, the diskettes filed and served containing the word processor file of the brief were scanned for viruses and are virus free.

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